Supreme Court, U. S.
FILED
JUL 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-41

PEDRO V. LUGO,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

SAVITZ & McCABE
Attorneys at Law
108 Ivy Street
San Diego, California
92101
(714) 231-1181

By: Michael J. McCabe

Attorneys for Petitioner

TABLE OF CONTENTS

Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of Relevant Facts	4
Reasons for Granting the Writ	11
Conclusion	19
Declaration of Service by Mail	20
Appendix A - Opinion of the United States Court of Appeals for the Ninth Circuit	1

CASES

Cupp v. Naughton, 414 U.S. 141, 148-49 (1973) 16

Lewis v. United States, 373 F.2d 576, 578 (9th Cir. 1967) 19

United States v. Conrad, 448 F.2d 271 (9th Cir. 1971) 19

United States v. Evanshik, 413, F.2d 950, 954 (2d Cir. 1969) 14

Cf. United States v. Miller, 546 F.2d 320, 324 (9th Cir. 1976) 16

United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 13, 15

United States v. Rajewski, 526 F.2d 149 (7th Cir. 1975), cert. denied, 426 U.S. 908 14

CASES

Title 21 United States Code section 846 3

Title 28 United States Code section 611(b) 3, 17, 19

Title 28 United States Code section 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

PEDRO V. LUGO,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, PEDRO V. LUGO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 14, 1978.

OPINION BELOW

The Court of Appeals entered its opinion and judgment on March 14, 1978. A copy of the opinion is attached and marked as Exhibit A.

Petitioner's petition for rehearing with the suggestion for rehearing in banc was denied on June 6, 1978.

JURISDICTION

On March 14, 1978, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of petitioner for conspiracy to possess a controlled substance with intent to distribute. On June 6, 1978, the Court of Appeals for the Ninth Circuit denied petitioner's petition for rehearing with the suggestion for rehearing in banc. The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court erred in failing to give an instruction as to the weight to be given the testimony of an admitted perjurer?

2. Whether the District Court erred in refusing to limit cross examination of a

severed co-defendant.

STATUTORY PROVISIONS INVOLVED

Title 21 United States Code section 846:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 28 United States Code section 611(b):

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

STATEMENT OF RELEVANT FACTS

The government's case against petitioner Pedro V. Lugo consisted principally of the testimony of two witnesses, Juanita Powell and Theadry Powell. Theadry Powell described to the jury a number of transactions involving the distribution of heroin which occurred between December 1972 and December 1974. The principal figures in these transactions were Mr. Powell, Henry Watson, and the petitioner. The last of these transactions resulted in Mr. Powell's arrest.

Following Powell's arrest, he was visited in jail by Watson, who had informed him that he had testified before the Grand Jury in Los Angeles and he had stated that he received only "weed" from appellant. Watson informed Mr. Powell that he could go before the Grand Jury and get a reduction in the time which would be imposed upon him. Powell told Watson that he intended to do so and that he would testify that he received heroin directly from petitioner and would leave Watson's

participation in the distribution scheme out of his testimony. [R.T. 175-190]. /[1]

Mr. Powell then appeared before the Grand Jury in Los Angeles and admitted to committing perjury before the Grand Jury. [R.T. 191].

The Court then permitted the witness to testify over petitioner's objection to his having received threats against his life and the lives of the immediate members of his family from petitioner during the period of time that both of them were incarcerated in the "bullpen" awaiting a Court appearance in the case. Mr. Powell testified that petitioner informed him that he had put out a "contract" for his life and that if Powell didn't keep his mouth shut he would be killed. [R.T. 191-193].

On cross-examination, Mr. Powell detailed

1/ "R.T." refers to Reporter's Transcript. "C.R." refers to Clerk's Record.

the areas of his testimony before the Grand Jury in Los Angeles which had been perjured. Specifically, Mr. Powell admitted lying to the Grand Jury regarding the manner in which the heroin was brought into the United States and about Watson's involvement in the heroin distribution scheme.

The government's other chief witness against appellant was Juanita Powell (no apparent relation to Theadry Powell). She also described a number of heroin transactions involving herself, Watson, Sam Wilkerson, and petitioner. Ms. Powell was given immunity from prosecution in return for her testimony.

Jewell Watson, the mother of co-defendant Henry Watson, testified for the government. She related that she had kept large sums of money for her son and had delivered sums of money to petitioner. After her son's arrest, petitioner offered her two (2) kilos of heroin that she could have to sell on his behalf.

Elmer David Hopson, a severed co-defendant, also testified for the government. He described seeing petitioner at Watson's house, working on figures with a calculator. Watson told Hopson that petitioner would be delivering a package of heroin.

After petitioner's renewed motion for severance was denied, the defense then presented a series of witnesses who testified to the manner in which petitioner made his money--by renovating old homes and reselling them for substantial profit. The defense also called a number of witnesses to testify concerning the manual labor which petitioner performed during this period of time in which he was allegedly making vast sums of money from trafficking in narcotics. Testimony was also adduced from defense witnesses indicating petitioner's poor financial condition and circumstances which led him to lose his night club. [R.T. 676-759].

Following the testimony of one of these witnesses, Francisco Garcia, a side bar conference was held outside the hearing of the jury in which the petitioner's counsel represented to the Court that a severed co-defendant, Charles Perry, had indicated he would be willing to testify on behalf of petitioner if the Court limited the scope of the allowable cross-examination by the government counsel to the matters which were raised by Perry's testimony on direct examination. Perry's proffered testimony was to the effect that he had been present in the "bull-pen" together with Theadry Powell and petitioner at the time in which Powell testified petitioner had threatened his life, and that he had heard no threats of any kind directed to Mr. Powell by petitioner. Mr. Jack McCabe (no relation to petitioner's present counsel) verified the statement made by petitioner's counsel as to the substance of his client's proffered testimony. The Court then refused

to limit the scope of cross-examination to the knowledge of the witness of the existence of any threats that were directed by appellant toward Theadry Powell. Based upon this statement, Perry's counsel advised the Court that he would advise his client to invoke his Fifth Amendment privilege not to testify in the case, and his client had previously indicated to him that he would follow that advice. [R.T. 759].

At the instructions conference held outside the presence of the jury, counsel for co-defendant Helen Doris Randall specifically requested the giving of an instruction relating to the credibility to be given the testimony of an admitted perjurer. He also requested a standard Devitt and Blackmar instruction relating to the inconsistent statements of a witness. [R.T. 771]. The Court had previously indicated that motions and requests made on behalf of one defendant would be received as if made on behalf of all defendants insofar as they were applicable to them. [C.R. 299].

In spite of the specific requests made for the giving of these jury instructions at the instruction conference, the Court failed to instruct the jury concerning the effect of inconsistent statements of a witness or as to the credibility of an admitted perjurer. [R.T. 862-875]. Following the Court's charge to the jury, but before the jury was excused to deliberate, petitioner specifically drew the Court's attention to its failure to instruct on the testimony of an admitted perjurer. However, the Court proceeded to excuse the jury without giving this instruction, or the previously requested instruction relating to the inconsistent statements of a witness. [R.T. 875].

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals misapplied principles of law in ruling that the District Court did not err in failing to give an instruction as to the weight to be given the testimony of an admitted perjurer. Such omission denied petitioner his right to a fair trial.

In spite of the specific request made by counsel for co-defendant Helen Doris Randall, in which petitioner was deemed to have joined, for the giving of a specific instruction relating to the manner in which the jury should view the testimony of an admitted perjurer, no such instruction was given by the Court. Moreover, the Court failed to give an instruction relating to the manner in which the jury was to consider an inconsistent statement of a witness although a specific request for such an instruction conference held outside the presence of the jury. [R.T. 771].

The combined effect of the District Court's failure to give these instructions was to leave the jury without guidance in a critical area of importance in the matter before it. The testimony of Theadry Powell, to which these requested instructions related, was extremely prejudicial to the case of petitioner. He was one of the principal witnesses against him (the other being Juanita Powell), and he provided detailed information concerning petitioner's link with the heroin distribution conspiracy which was the subject of the indictment.

Although Mr. Powell admitted perjuring himself before the Federal Grand Jury in Los Angeles in his testimony given before that body the jury was not informed his testimony was to be distrusted because of that circumstance. Nor was the jury instructed as to the manner in which it was to evaluate the inconsistent statements made by Mr. Powell in his testimony at the trial of the case as opposed to his statements made

before the Grand Jury in Los Angeles. Although the Court did give an "accomplice instruction" in which it directed the jury to consider the testimony of such an individual with "greater care than the testimony of an ordinary witness," /2/ only a passing reference to inconsistencies in the testimony of a witness was made by the Court in its general instruction regarding the manner in which the jury was to determine credibility in general. [R.T. 864].

The Court of Appeals relied on United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), Cert. denied, 419 U.S. 1120, and similar cases to support the government's claim that the District Court did not err in this case. [G.B. 18]. /3/ A close reading of Polizzi, supra, reveals that denial of the "perjury instruction" is not reversible error when accompanied by the giving of

2/ This instruction was taken from Devitt and Blackmar, 3rd Edition, section 17.02 and appears at R.T. 865.

3/ "G.B." refers to Government's Brief

instructions relating to the effect of inconsistent statements. Polizzi, supra, at 878. The same result was reached in the other cases relied on by the government on appeal. United States v. Evanshik, 413, F.2d 950, 954 (2d Cir. 1969); United States v. Rajewski, 526 F.2d 149 (7th Cir. 1975), Cert. denied, 426 U.S. 908.

The vital difference between those cases and the case at issue here is that there instructions as to inconsistent statements were given along with a "co-conspirator instruction", Evanshik, supra, "accomplice instruction", Rajewski, supra, or an "informer instruction", Polizzi, supra, whereas here the "inconsistent statement instruction" was not given as requested. Since testimony characterized by inconsistent statements and testimony given by an admitted perjurer both involve a demonstrated propensity for the witness to lie, an instruction as to one will suffice for the other as well. It is the presence of the "inconsistent

statements instruction" that cures the defects in the above cases.

Unlike the situation presented to the Court in United States v. Polizzi, 500 F.2d 856, 878 (9th Cir. 1974), the failure of the Court to instruct concerning the effect to be given the testimony of an admitted perjurer, (Devitt and Blackmar section 17.05) cannot be considered harmless error. Unlike the situation in Polizzi, the District Court here not only failed to give that instruction, but also failed to give a specifically requested instruction concerning the effect of inconsistent statements of a witness (Devitt and Blackmar section 17.16).

The government argued on appeal that such omission is nevertheless "de minimus" because appellant's counsel was able to develop the perjury issue on cross-examination of witness Theadry Powell and in the closing argument. The jury hears many things during the course of a trial, but inasmuch as it is the trial judge's charge that is the last

heard and this is,

> ". . . designed to . . . give [the jury] some guidance by which to evaluate the . . . testimony. . .,"

Cupp v. Naughton, 414 U.S. 141, 148-49 (1973), one must conclude that the effect of the trial judge's charge is anything but de minimus.

It is submitted that the mere giving of the "accomplice" instruction was insufficient to adequately guide the jury in its assessment of the testimony of Theadry Powell. Since Mr. Powell was one of the two principal witnesses against appellant this failure must be considered to be reversible error. Cf. United States v. Miller, 546 F.2d 320, 324 (9th Cir. 1976) [conviction reversed due to Court's failure to include the cautionary portion of the accomplice instruction in re-reading this instruction to the jury upon its request].

2. The District Court's refusal to limit the scope of cross-examination of a severed co-defendant constituted an abuse of discretion and denied petitioner a fair trial.

The provisions of Rule 611(b), Federal Rules of Evidence were clearly violated by the action of the District Court in this case in refusing to limit the cross-examination of previously severed co-defendant, Charles Perry. Mr. Perry had indicated that he would be willing to testify on behalf of petitioner if the Court restricted the cross-examination of government counsel to the subject matter of the alleged threats made against the life of Theadry Powell by petitioner. Mr. Perry's proffered testimony was that he was present in the "bullpen" at the time Theadry Powell alleged that petitioner had threatened his life. Although both petitioner and Powell were present with him at this time, he heard no threats made by petitioner to Mr. Powell. This offer of proof as to Perry's expected testimony was verified by his attorney who was

present at the side bar conference at which this matter was discussed. Perry's counsel indicated to the Court that his client was willing to offer that testimony only if the Court excluded from cross-examination by government counsel matters relating to Perry's participation in the heroin distribution scheme which was the subject of the prosection. When the Court indicated that it would not thoroughly restrict government counsel in his cross-examination, Perry's attorney advised the Court that his client would invoke his Fifth Amendment privilege not to testify.

Given the above-outlined circumstances, the ruling of the District Court operated to deprive petitioner of the testimony of Charles perry, which was clearly relevant and helpful in disputing Theadry Powell's version of what had occurred between petitioner and him. Here, again, the ruling of the District Court operated to deprive petitioner of the means with which to defend himself

against the uncorroborated accusations of Powell concerning the threats made against his life by appellant. See also, Lewis v. United States, 373 F.2d 576, 578 (9th Cir. 1967); United States v. Conrad, 448 F.2d 271 (9th Cir. 1971).

Cross-examination limited to the subject matter embraced within direct examination is the rule rather than the exception. Rule 611(b), Federal Rules of Evidence; Lewis, supra. This preference is underscored by the fact that Congress specifically rejected this Court's proposal of unrestricted cross-examination. The refusal to limit cross-examination of a severed co-defendant whose testimony would contradict the highly prejudicial testimony of Theadry Powell deprived petitioner of a fair trial, especially when viewed in light of the failure of the District Court to adequately instruct the jury on the testimony of Mr. Powell, an admitted perjurer,

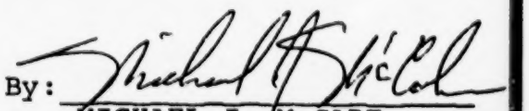
and in light of the denial of a motion to sever co-defendants whose testimony at a severed trial would contradict that of Mr. Powell.

CONCLUSION

For these reasons, the Petitioner, Pedro V. Lugo, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

SAVITZ & McCABE

Dated: June 29, 1978 By: 

MICHAEL J. McCABE

Attorneys for Petitioner
PEDRO V. LUGO

APPENDIX A

"APPENDIX A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 77-1717
Plaintiff-Appellee,	MEMORANDUM
vs.	
PEDRO LUGO,	
Defendant-Appellant.	

On Appeal from the United States District Court for the Southern District of California

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and KING, * District Judge

Appellant Pedro Lugo was indicted along with twenty-four other persons for conspiracy to possess with intent to distribute cocaine and heroin [21 U.S.C. 841(a)(1) and 846]. He was tried by jury and found guilty. He now appeals.

*The Honorable Samuel P. King, Chief Judge, United States District Court for the District of Hawaii, sitting by designation.

Full recitation of the facts of this case would add nothing to judicial literature. Suffice it to say that the evidence was amply sufficient to show that Lugo was a central figure and the primary source in a nationwide conspiracy to possess and distribute cocaine and heroin. While Lugo raises several assignments of error, we find none to be persuasive and affirm. Some we discuss briefly below.

I. JURY INSTRUCTIONS

Lugo contends that the trial court committed reversible error by failing to give an instruction to the jury as to the weight to be given the testimony of witness Powell (unrelated to Juanita Powell mentioned hereafter), an admitted perjurer before the Grand Jury. This instruction would have instructed the jury that Powell's testimony was to be "considered with caution and weighed with great care." /1/ We assume

1/ Devitt and Blackmar (1977) section 17.05.

that the alleged error was properly preserved for appellate review.

Because the jury was instructed that Powell's testimony as an accomplice and co-conspirator should be "examined and weighed by the jury with greater care than the testimony of an ordinary witness" (C.R. 865) and also that "such testimony is always to be received with caution and weighed with great care," (C.R. 866), we find that there was no reversible error in failing to give the admitted perjurer instruction. See United States v. Polizzi, 500 F.2d 856, 878 (9th Cir. 1974), cert. denied, 419 U.S. 1120, and United States v. Morgan, 555 F.2d 238, 243 (9th Cir. 1977). The court also gave a general instruction dealing with witness credibility as follows:

> "In determining the credibility of a witness, you may consider any matter in evidence that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:. . ., statements previously made by the witness that are consistent or inconsistent with his testimony."

In short, the proposed perjurer instruction was merely cumulative and added nothing more to the instructions on how the jury was to weigh Powell's testimony. As we stated in United States v. Polizzi:

> "Even if this were error, which we do not find, any prejudice resulting from it was cured by the instructions given. . . . These instructions sufficiently alerted the jury to the caution necessary in weighing the testimony of a witness like [Powell]." (500 F.2d at 878).

As in Morgan, supra, the appellant brought out the perjury issue on his cross-examination of Powell and argued it forcefully to the jury in summation.

II. SEVERANCE

Lugo moved to have his trial severed from other co-defendants. This motion was denied. Lugo argues that if his trial had been severed, two co-defendants would have testified in his behalf about a certain alleged threat Lugo made against government witness Powell. Based on these circumstances, Lugo contends that the trial court's denial of his severance motion was an abuse of

discretion. We disagree on the basis of United States v. Gay, ___F.2d___ (9th Cir. Jan. 19, 1978) where we recently rejected a quite similar contention.

We find neither a "manifest prejudice" to Lugo in the denial of his severance motion or a "clear and affirmative" showing of abuse of the trial court's discretion. /2/ See United States v. Gay, supra, and the myriad of cases cited therein.

III. CROSS-EXAMINATION

Lugo wanted to call a severed co-defendant, Charles Perry, to testify that no threats had been made by Lugo against witness Powell. Perry had indicated that he would testify only if the court would limit cross-examination to the subject matter

2/ The trial judge pointed out to appellant when severance was first requested that the same testimony, i.e., whether appellant threatened T. Powell was available from one Leon Hammond, a co-conspirator who had previously entered a guilty plea. Since another source existed, it was not error to decline severance. Appellant never called Hammond as a witness or offered any explanation why Hammond could not testify.

of the threats. The court refused to so limit the cross-examination, Perry refused to testify on Fifth Amendment grounds, and Lugo contends this failure to limit cross-examination was error. We disagree.

It is well-settled that "the extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court," Alford v. United States, 509 F.2d 745, 749 (9th Cir. 1975), and that "absent plain abuse of the Court's discretion on the latitude of cross-examination, there is no reversible error." Egger v. United States, 509 F.2d at 749.

Under Rule 611(b), F.R.E., "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." (emphasis added) Because Perry was a co-defendant and alleged accomplice, inquiry into matters other than the threat itself would reflect upon Perry's possible bias

and his credibility. Such is the proper subject of inquiry on cross-examination. Alford v. United States, supra, Rule 611(b), F.R.E.

The trial court did not abuse its discretion by refusing to limit Perry's cross-examination. /3/

IV JENCKS ACT - GRAND JURY TESTIMONY

The defense was furnished with the Grand Jury transcript of a government witness, Juanita Powell. Of this transcript, the trial court excised twenty-three pages (pp. 30-53). Lugo contends that refusal by the trial court to force the government to produce the entire transcript violated the Jencks Act [18 U.S.C. 3500] and constituted reversible error.

Lugo concedes, however, that before there can be reversible error this court must make a determination that the excised

3/ Again we note that the same testimony was apparently available from Leon Hammond.

portion of the Grand Jury testimony "relates to the subject matter of Ms. Powell's trial testimony." (Appellant's Opening Brief, p. 23).

The transcript in question was forwarded to this court under seal. We have carefully studied the testimony of Juanita Powell at trial and the excised portion of the Grand Jury transcript has only remote relation to the subject matter of Ms. Powell's trial testimony.

The trial court did not err in excising the twenty-three pages of transcript. See 18 U.S.C. 3500(b) and (c).

Other contentions raised by Lugo have been studied and found to be without merit.

AFFIRMED